



After reviewing the entire record, the Appeals Board finds:

The Order entered by the Assistant Director should be affirmed.

The Administrative Law Judge denied this claim for death benefits filed by the decedent's widow and stepdaughter. On May 24, 1995, the Appeals Board reversed the Administrative Law Judge's decision and awarded death benefits.

The decedent's widow, Cheryl K. Anderson, settled a wrongful death claim against a third party on June 16, 1994 for a \$225,000 lump sum and monthly payments of \$1,400 for 20 years, plus four additional payments of \$8,000 each. The decedent's stepdaughter, Mary E. Clark, was not a party to the wrongful death claim because she was not an heir of decedent. The District Court has not determined the apportionment of costs and fees between the widow and respondent in the wrongful death claim.

In June 1995, the widow and stepdaughter made demand pursuant to K.S.A. 44-512a for payment of the Award. Respondent denied that any payment was due because of the subrogation provisions of K.S.A. 44-504.

(1) Because of the subrogation rights given to the respondent under K.S.A. 44-504, the Appeals Board finds there is no compensation due and owing the surviving spouse and, thus, no penalty can be ordered under K.S.A. 44-512a for nonpayment of benefits.

The monies the widow alleges due and owing are not the death benefits awarded in this workers compensation proceeding but rather the attorney fee that is claimed from the respondent in the wrongful death claim.

(2) The Appeals Board finds there is no penalty due under K.S.A. 44-512a for workers compensation benefits awarded to the decedent's minor stepdaughter.

K.S.A. 44-512a provides that an "employee shall be entitled to a civil penalty" when compensation awarded under the Workers Compensation Act is not paid when due. K.S.A. 44-508 defines employee to include a conservator if the individual is either a minor or is incapacitated. K.A.R. 51-10-6 requires a conservator to be appointed when compensation payable to a minor may potentially exceed \$2,000.

Based upon the language of the two above-cited statutes and the administrative regulation, the Appeals Board finds that the respondent and its insurance carrier are excused from making payment of compensation awarded to the decedent's minor stepdaughter until such time as a conservator is appointed by the District Court. The Appeals Board also finds that the conservator is the proper party to make written demand for payment of compensation under K.S.A. 44-512a. This was not done. Based upon these reasons, penalties are not due at this time on the compensation awarded to the stepdaughter.

Respondent argues K.S.A. 44-504 allows it to credit the wrongful death claim settlement to the benefits awarded the stepdaughter. The Appeals Board disagrees. The stepdaughter was not an heir of decedent and, therefore, did not participate in the wrongful death claim. Therefore, the stepdaughter did not recover monies in the claim for which respondent can claim credit.

The Appeals Board adopts the findings and conclusions of the Assistant Director as set forth in the Order.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order entered by Assistant Director David A. Shufelt dated February 9, 1996, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Topeka, KS  
Ronald J. Laskowski, Topeka, KS  
David A. Shufelt, Assistant Director  
Philip S. Harness, Director